Nos. 93-517, 93-527, 93-539

In The

# Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,

*Petitioners,*

v.

LOUIS GRUMET AND ALBERT W. HAWK,

*Respondents.*

On Writ Of Certiorari
To The New York Court Of Appeals

## BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, AMERICAN CIVIL LIBERTIES UNION, NATIONAL COUNCIL OF JEWISH WOMEN, AND THE UNITARIAN UNIVERSALIST ASSOCIATION, IN SUPPORT OF RESPONDENTS

RUTH LANSNER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
Anti-Defamation League
323 United Nations Plaza
New York, NY 10017
(212) 490-2525

SAMUEL RABINOVE
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

*Of Counsel:*
IRA C. LUPU

STEVEN K. GREEN
*(Counsel of Record)*
Americans United
for Separation of Church
and State
8120 Fenton Street
Silver Spring, MD 20910
(301) 589-3707

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Page**

**Page**

**Page**

**Page**

**Page**



**CONSTITUTIONAL AND STATUTORY PROVISIONS**



**OTHER AUTHORITIES**

**Page**

**Page**

No. 93-517, 93-527, 93-539

In the
**Supreme Court of the United States**

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

*Petitioner,*

v.

LOUIS GRUMET AND ALBERT W. HAWK,

*Respondents.*

On Writ of Certiorari
To The New York Court Of Appeals

# BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, AMERICAN CIVIL LIBERTIES UNION, NATIONAL COUNCIL OF JEWISH WOMEN, AND THE UNITARIAN UNIVERSALIST ASSOCIATION, IN SUPPORT OF RESPONDENT

## INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

## STATEMENT OF THE CASE

*Amici* adopt the statement of facts in Respondent's brief.

## ARGUMENT

### I. CHAPTER 748 VIOLATES CORE PRINCIPLES OF NONESTABLISHMENT BY REALIGNING GOVERNMENTAL STRUCTURES IN A WAY THAT MAXIMIZES A RELIGIOUS COMMUNITY'S CONTROL OVER AN AGENCY OF GOVERNMENT

#### A. By Creating the Kiryas Joel Village School District the State has Enacted a Law Respecting an Establishment of Religion

This case is not about whether the children of the Kiryas Joel community are entitled to receive special educational services pursuant to applicable laws. *Amici* acknowledge that all children, irrespective of their enrollment in public, private or sectarian schools, are entitled to receive "comparable" educational services under the law. *Wheeler v. Barrera*, 417 U.S. 402, 420-421 (1974).[1]

[1] *Amici* also do not question the right of Satmar Hasidic parents to educate their children in a manner that conforms with the practices and tenets of their religious faith, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a faith that exhorts its adherents to eschew all but the most necessary contacts with the greater secular culture. Record on Appeal (R.) at 464.

Instead, the issue before the Court is whether the creation of a separate school district that, *by design*, conforms to the geographic boundaries of an insular religious community and is controlled and operated by the same religious enclave, is a constitutionally valid mechanism for delivering such services. As was true for the New York Court of Appeals in earlier litigation concerning the provision of special educational services to the Kiryas Joel community, *Board of Education of the Monroe-Woodbury C.S.D. v. Wieder*, 72 N.Y.2d 174 (1988), this Court is not being called upon to judge all solutions but this solution only.

Consequently, the narrow issue here is whether this solution -- the purposeful creation of a fully operational school district that is coterminous with the boundaries of an insular religious community and is controlled by members of that sect -- is constitutionally appropriate.[2] *Amici* contend that it is not. By intentionally creating a separate public school district that is geographically coincident to the boundaries of a religious community, the State of New York has expressly empowered that community to operate a unit of government.[3] This purposeful

---

[2] As such, the issue before this Court is not whether some other alternative -- such as a neutral site -- may be constitutionally acceptable or whether Chapter 748 is "analogous" to a neutral site. *See* Brief for the Petitioner Kiryas Joel Village School District (KJVSD Brief), at 30. Nonestablishment is not merely an inquiry into the legitimacy of governmental ends but is also an examination into the means to accomplish those ends. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-124 (1982); *cf. Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978)("the evil of protectionism can reside in legislative means as well as legislative ends.").

[3] The Record on Appeal and the prior litigation involving the Satmar Hasidic community of Kiryas Joel conclusively establish the close relationship between the religious community, the Village, and Kiryas Joel Village School District (KJVSD). R. 492 ¶ 7; 514-616; Joint Appendix (J.A.) at 10. As one example of the intertwining relationships between the religious community and governmental agencies, Abraham Weider serves as president of the Village's main synagogue, Congregation Yetev Lev D'Satmar, as a trustee of the community's main yeshiva, as Deputy Mayor of the Village, and as president of the Kiryas Joel Village School Board. N.Y. Times, Jan. 5, 1994, at A15; Village Voice, Dec. 21, 1993, at 31.

delegation of governmental authority to a religious entity violates core notions of nonestablishment of religion going back to our nation's founding. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

The Establishment Clause of the First Amendment was designed to do more than forbid the creation of a national church. As Chief Justice Warren declared in *McGowan v. Maryland*, the First Amendment, "in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a broad interpretation . . . in light of its history and the evils it was designed forever to suppress." 366 U.S. 420, 441-442 (1961); *accord, Lee v. Weisman*, 505 U.S. ---, 112 S. Ct. 2649, 2669-70 (1992)(Souter, J., concurring); *School District of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985)(the Establishment Clause is "more than a pledge that no single religion will be designated as a state religion.").[4] Time and again, this Court has acknowledged that "a law may be one 'respecting' the forbidden objective while

---

As described by the Appellate Division below:

> Chapter 748 created a school district coterminous with the Village which is inhabited by residents who are almost exclusively of one religious sect. The school board is controlled by members of that sect and the children who attend the public school established by the district are all of that sect. . . . [T]he services which were otherwise available at the public schools of the Monroe-Woodbury District are now provided by a public school that is controlled by and located within the religious community.

187 A.D.2d at 22.

[4] "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" *McCollum v. Board of Education*, 333 U.S. 203, 213 (1948)(Frankfurter, J., concurring). *Accord, Everson v. Board of Education*, 330 U.S. 1, 31 (1947)(Rutledge, J., dissenting)("Not simply an established church, but any law respecting an establishment of religion is forbidden.").

falling short of its total realization." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Everson v. Board of Education*, 330 U.S. 1 (1947). This "spacious conception of separation of church and state," as Justice Frankfurter characterized in *McCollum v. Board of Education*, 333 U.S. 202, 213 (1948), has been understood to mean:

> that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, *may not delegate a governmental power to a religious institution*, and may not involve itself too deeply in such an institution's affairs.

*Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 590-591 (1989)(emphasis supplied). Thus, at the most fundamental level, the Establishment Clause prohibits the realigning of government structures to meet the needs of a religious community, as well as the granting of governmental authority to such communities. As this Court stated in *Larkin v. Grendel's Den*, "[t]he Framers did not set up a system of government in which important . . . governmental powers would be delegated to or shared with religious institutions." 459 U.S. at 127.[5]

Few political arrangements come closer to violating this core notion of a religious establishment than the creation of KJVSD. By purposefully creating a separate school district that conforms to the religious practices of a religious community, the State has

---

[5] Justice Powell engaged in wishful thinking in declaring that:

> At this point in the 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes -- or even of deep political division along religious lines -- is remote.

*Wolman v. Walter*, 433 U.S. 229, 263 (1977)(Powell, J., concurring).

effectively delegated to that religious community the authority to operate an agency of government. That the Establishment Clause bars the delegation of governmental authority to religious entities while it forbids the appearance of joint enterprises between religion and government finds its roots in the most basic concerns of the Framers of the Constitution.[6] At the conclusion of the Revolution, religious establishments involved much more than financial support for religious worship. On one level, establishments provided special privileges to recognized churches through the licensing of ministers, the incorporation of churches, and the provision of glebe lands.[7] But establishment also meant that rights, privileges and benefits of citizenship were tied to membership in approved churches through religious qualifications for office-holding, service on juries and witness testimony in courts of law. L. Levy, The Establishment Clause 1-6 (1986); M. Borden, Jews, Turks, and Infidels 11-15 (1984); L. Pfeffer, Church, State and Freedom 78, 106-107 (1967).[8] Direct opposition to the "historically and constitutionally discredited policy" of tying one's standing in the political community to matters of faith led the Framers to adopt Article VI, section 3 of the Constitution as a guarantee that political standing was no longer

---

[6] As Justice Kennedy observed in *Allegheny*, we must look for "results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment Jurisprudence." 492 U.S. at 669.

[7] At the conclusion of the Revolution, the constitutions and laws of eight states still provided for varying forms of multiple establishments through assessments in support of religious worship. Only established churches could own land, receive bequests, or sue in courts to enforce their rights. L. Pfeffer, Church, State and Freedom 107-119 (1967); L. Levy, The Establishment Clause 4-6 (1986).

[8] Eleven of the thirteen original states restricted public officeholding and other official duties to Christians or Protestants, although four removed or modified their restrictions by the time of the ratification of the First Amendment. T. Curry, The First Freedoms 221-222 (1986). According to Professor Borden, Jews were not considered full citizens in Rhode Island until the passage of the 1842 Constitution. Borden, *supra*, at 13.

dependent upon matters of faith. *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961).[9]

In addition to these concerns, the Framers also sought to avoid "the danger of political oppression through a union of civil and ecclesiastical control" that existed under establishments of religion. *Larkin*, 459 U.S. at 127 n.10. Colonial established churches performed quasi-governmental duties through their exclusive authority to record births, perform marriages and operate early public schools. This exercise of civil authority by religious entities, what John Adams termed the conjoining of "temporal and spiritual tyranny," was seen by the Framers as an event totally "calamitous to human liberty." B. Bailyn, The Ideological Origins of the American Revolution 97 (1967). Historians have long recognized how the controversy surrounding the proposed appointment of an Anglican Bishop in the American colonies was a precipitating factor in bringing about the Revolution. A. Cross, The Anglican Episcopate and the American Colonies (1902); C. Bridenbaugh, Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities and Politics, 1689-1775 (1962). In particular, colonists feared that the social and political influence of the English episcopate would take root in America, thus empowering the established church to exercise greater influence in matters of state. According to John Adams, this aversion to the exercise of political authority by religious entities contributed "as much as any other cause" to the Revolution and eventual disestablishment. A. Stokes, Church and State in the United States vol. 1 at 231-240 (1950).

Thus, concern over the "silent accumulations and encroachments of Ecclesiastical Bodies" on the new democratic government, Madison, *Detached Memoranda* (1832), in R. Alley, ed., James Madison on Religious Liberty 89 (1985), was a leading

---

[9] "[T]he religious liberty protected in the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985)(O'Connor, J., concurring).

"animating Principle[] behind the adoption of the Establishment Clause." *Lee*, 112 S. Ct. at 2661. The Establishment Clause was written in part to ensure that religious organizations were bereft of all civil authority. The Court acknowledged this purpose in one of its earliest church-state cases by declaring that "[t]he structure of our government has, for the preservation of civil liberty, rescued temporal institutions from religious interference." *Watson v. Jones*, 13 Wall. 679, 730 (1872)(quoting *Harmon v. Dreher*, 1 Speers Eq. 87, 120 (S.C. 1843)).

This understanding that nonestablishment forbids joint church-state operations and the delegation of civil authority to religious entities was adhered to in the nineteenth century. A few examples are instructive. On February 21, 1811, President James Madison vetoed a bill that would have authorized a District of Columbia church to educate local poor children, stating that it "would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civic duty." *Veto Message*, Feb. 21, 1811, in Alley, *supra*, at 79. In 1841, the New York Legislature expressly rejected a proposal by state Superintendent of Schools John Spencer that would have allowed Catholic parochial schools to serve as "public" schools in Catholic wards. Although a handful of New York school districts later made separate agreements with Catholic churches for the joint operation of public schools, these arrangements were highly controversial and ultimately led to the enactment of a new constitutional amendment forbidding the use of any public monies for any school "wholly or in part under the control or direction of any religious denomination." J. Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 182-187, 226, 252 (1967).[10] Courts in other states concurred with this view by striking down similar proposals that would have authorized religious-

---

[10] New York Constitution of 1894, article IX, section 4, now article XI, section 3. The 1841 proposal followed the New York City Common Council's denial of Roman Catholic requests for a share of the common school fund for parochial schools. *Id.* at 174-186; *accord*, D. Ravitch, The Great School Wars 33-66 (1974).

charitable entities to levy taxes for the operation of privately-run public schools. *See People v. McAdams*, 82 Ill. 356 (1876); *Jenkins v. Inhabitants of Andover*, 103 Mass. 94 (1869).

The small number of reported cases in this century involving delegation of governmental authority to religious entities indicates wide acceptance of this principle. In those few cases addressing this issue, courts have spoken with a clarity of voice that such grants violate core principles of nonestablishment. *Larkin, supra*; *Barghout v. Mayor and City Council of Baltimore*, 833 F. Supp. 540, 549 (D. Md. 1993)(Kosher ordinance in question "identifies orthodox Judaism as the recipient of civil authority."); *Oregon v. Rajneeshpuram*, 598 F. Supp. 1208, 1215 (D. Oregon 1984) (municipality run by religious organization constitutes a joint exercise of legislative authority by church and state); *State v. Clemer*, 80 N.J. 405, 404 A.2d 1 (1979)(delegation of municipal powers to religious campground violates Establishment Clause); *People v. Rose*, 82 Misc. 2d 429, 368 N.Y.S.2d 387, 391 (Sup. 1975) (invalidating judicial proceeding held in religious school).[11] As the New Jersey Supreme Court declared in *Clemer*, "there can be no question but that at a minimum [the First Amendment] precludes a state from ceding governmental powers to a religious organization." 404 A.2d at 6.

In recent years this Court has articulated the prohibition represented through this constitutional norm in several ways. The Court has held that the Establishment Clause forbids creating a "crucial symbolic link between government and religion," *Grand Rapids*, 473 U.S. at 385, "foster[ing] a close identification of [government] powers and responsibilities with . . . religious denominations," *id.* at 389; "delegating governmental power to

---

[11] *Cf. Ran-Dav's County Kosher, Inc., v. State*, 129 N.J. 141, 158, 608 A.2d 1353, 1361 (1992)(civil enforcement of religious law by religious personnel unconstitutional); *Spacco v. Bridgewater School Dept.*, 722 F. Supp. 834, 844-847 (D. Mass. 1989)(municipal lease of Catholic parish center requiring that use conform with teachings of the Catholic Church invalid).

religious institutions," *Larkin*, 459 U.S. at 123; creating "the mere appearance of a joint exercise of legislative authority by Church and State," *id.* at 125; and creating "a fusion of governmental and religious functions." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).[12] Regardless of the exact phrasing, the Establishment Clause bars the creation of a public school district that is coincident with and controlled by a religious enclave.

The Court should not be diverted by Petitioner KJVSD's argument that the New York Court of Appeals' decision denies Village residents their rights to self-determination and of local control. The record is uncontroverted, and Petitioner readily acknowledges, that the Village is an insular religious community, a religious enclave, with a Village school board comprised solely of Satmar Hasidics. KJVSD Brief at 3-4, 33-34; *See* n.3, *supra*. But unlike possible arrangements in other religiously homogeneous communities, KJVSD was created with the express purpose of vesting a religious community with political authority.[13] As such, this case is fundamentally different from *McDaniel v. Paty*, 435 U.S. 618 (1978), which struck down a state law disqualifying clergy from holding legislative office. In contrast to the law in *McDaniel*, Chapter 748 effectively guarantees a religious community's control and operation of a unit of government. This the Establishment Clause cannot allow. History has taught that a "free democratic

---

[12] Alternatively, Justice Kennedy has observed that the delegation of official powers to religious groups can be seen as involving the coercive power of the government, thus constituting the "first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 660, 664 (Kennedy, J., concurring and dissenting).

[13] Because of the "sensitive relationship between religion and government in the education of our children," *Grand Rapids*, 473 U.S. at 383, this Court can find Chapter 748 unconstitutional without addressing the constitutionality of the incorporation of Kiryas Joel Village, an issue not before this Court. However, *amici* do not concede the constitutionality of Kiryas Joel Village, especially since the record reflects that the boundaries of the Village were drawn in a manner that effectively excluded all non-Hasidics from the Village. *See* "Decision on Sufficiency of Petition," J.A. 8-16.

government . . . cannot endure when there is a fusion between religion and the political regime." *Lee*, 112 S. Ct. at 2667 (Blackmun, J., concurring). Chapter 748 should be held unconstitutional as violating these core principles.

B. Chapter 748 Violates the Establishment Clause By Providing Preferential Treatment for One Religious Group

The law establishing KJVSD, Chapter 748, also violates the Establishment Clause by singling out the Satmar Hasidic community of Kiryas Joel for a special benefit -- its own public school system -- a benefit not shared by any other religious group. Because this law sets up a religious preference, it should be subjected to strict scrutiny analysis. *See Larson v. Valente*, 456 U. S. 228, 246 (1982); *accord, Allegheny*, 492 U.S. at 608-612. While *amici* question whether a law setting up a religious preference can ever satisfy the mandate of the Establishment Clause, *see infra* at 13-14, at a minimum, Chapter 748 is not "closely fitted" to further the asserted governmental interest and must fail. *Larson*, 456 U.S. at 251.

Both the legislative history and circumstances surrounding the law support a finding of religious preference. KJVSD was carved out of a preexisting public school district for the purpose of providing special educational services that were already available through the public schools of Monroe-Woodbury Central School District.[14] Supporters of the law acknowledged that the new school district was for the benefit of the Satmar Hasidic community, with the rationale being to assist Satmar children in receiving services in an environment and under conditions that met with the strictures of

---

[14] *Amici* do not here assert that Chapter 748 fails the secular purpose component of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As discussed in Part III-A, *infra*, *amici* believe that the decision of the court below can be affirmed without direct reference to the three-part *Lemon* test. In particular, *amici* assert that the Court can find that Chapter 748's purpose was to confer a special benefit on the Kiryas Joel Satmar Hasidic community without having to determine that the law was motivated by improper religious purpose under *Lemon*.

their religious faith. Writing Governor Cuomo to encourage him to sign Chapter 748, Assemblyman Lentol argued that the bill was necessary because "[t]he hasidic jewish community hold[s] firmly to its religious tenets." J.A. 19. *See also* Letter of Assemblyman Silver at J.A. 38-39 (Chapter 748 provides "a mechanism through which [Satmar] students will not have to sacrifice their religious traditions in order to receive services."). In signing Chapter 748 into law, Governor Cuomo acknowledged that the State was creating a school district for a village "whose population are all members of the same religious sect." J.A. 40-41. No other religious community has received such preferential treatment.

As this Court declared in *Larson*, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. Legislative preferences conflict at the most basic level with the notion of governmental neutrality and equality of religion, a principle that has been the touchstone of Establishment Clause jurisprudence since *Everson*, 330 U.S. at 15 (government cannot "pass laws which aid one religion . . . or prefer one religion over another."). *Accord, Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting)("The [Establishment] Clause was designed to stop the . . . Government from asserting a preference for one religious denomination or sect over others."); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)("true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("government must be neutral when it comes to competition between sects."). *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. ---, 113 S. Ct. 2217 (1993).[15] The selective imposition of special benefits and burdens through religious preferences indicates governmental favoritism while it produces religious inequality, a matter of great concern to the

---

[15] As *Hialeah* makes clear, government efforts to benefit religion generally or particular religions are to be judged under the Establishment Clause. 113 S. Ct. at 2226.

Framers.[16] Religious preferences also raise the "risk of politicizing religion" and "religious gerrymandering" as sects compete in legislative halls for similar advantages. *Larson*, 456 U.S. at 252-255; *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970). As is indicated in the earlier litigation and newspaper accounts, the special treatment awarded the Satmar Hasidic community has spawned political and religious dissension. *See Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1238 (2d Cir. 1986); *Waldman v. United Talmudical Academy*, 147 Misc. 2d 529, 558 N.Y.S.2d 781 (Sup. 1990); *see also* sources cited *supra* n.3.

Because religious preferences violate religious neutrality and equality at a fundamental level, the Court should hold that Chapter 748 is *per se* unconstitutional without engaging in a balancing of interests. Legislation purposefully setting up a religious preference -- a situation even more troubling under our system of rights than the general advancement of religion by government -- should not be subject to a lesser constitutional standard under which government interests might trump rights. As Justice Jackson opined in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

The dangers appurtenant to explicit legislative religious preferences are so great that they should be struck down *ab initio*.

---

[16] That the Framers were opposed at a minimum to religious preferences cannot be gainsaid. In his *Memorial and Remonstrance* in opposition to the proposed "Bill establishing a provision for Teachers of the Christian Religion," James Madison argued that "the Bill violates equality by subjecting some to peculiar burdens . . . [and] by granting to others peculiar exemptions." R. Alley, *supra*, at 57.

Traditional application of strict scrutiny analysis also requires that Chapter 748 be struck down. As the Court reaffirmed in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987), "*Larson* indicates that laws discriminating among religions are subject to strict scrutiny." *Accord, Allegheny*, 492 U.S. at 608-609. Although Chapter 748 does not expressly discriminate against any religion, it is directed at one particular sect only and falls within the ambit of *Larson* which also was directed at "a state law granting a denominational preference." 456 U.S. at 246.[17] Indeed, this case is more compelling than *Larson* for application of strict scrutiny in that *Larson* involved only *de facto* sect discrimination (which the Court held was motivated by covert hostility to the Unification Church). *Id.* Moreover, because Chapter 748 provides the special benefit of a separate school district only to the Kiryas Joel Satmar Hasidic community, it cannot be considered a general government program "that neutrally provide[s] benefits to a broad class of citizens defined without reference to religion." *Zobrest v. Catalina Foothills School District*, 509 U.S. ---, 113 S. Ct. 2462, 2466 (1993). Instead, this law is more akin to the ordinances struck down last term in *Hialeah, supra*.

*Amici* are in basic agreement with the analysis of Chief Judge Kaye's concurrence below which held that even if the delivery of special educational services to the Satmar Hasidic children constitutes a compelling state interest, Chapter 748 is not narrowly tailored to achieve that end. The creation of a separate school district vested with "all the powers and duties of a union free school district" was unnecessary to meet the children's special education needs, *see* Legislative Bill Jacket, R. 698-701, especially in light of the fact that the services were being provided by the Monroe-Woodbury Central School District and, that at the time

---

[17] *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)(rejecting arguments that "the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process" or merely because the legislation in question benefits a minority group.).

KJVSD was established, only 13 children were eligible to receive full-time services. J.A. 81 ¶ 16.

*Amici* contend that alternatives exist for delivering special educational services under the auspices of the Monroe-Woodbury Central School District, possibly through the mechanism of a neutral site chosen on the basis of legitimate secular factors. *Wolman v. Walter*, 433 U.S. 229, 247-248 (1977). KJVSD was created, and the present conflict has come before this Court, in large measure because of the intransigence of both the Kiryas Joel community and the Monroe-Woodbury Central School District. The Court of Appeals in *Board of Education v. Wieder* did not rule that every alternative mechanism, including all neutral sites, would be constitutionally infirm. Instead, the court surmised that "[i]t might well be that certain of the services in controversy could be furnished to [the Satmar Hasidic children] at neutral sites if [the Board] determined to do so." 72 N.Y.2d at 189, n.3. Because *Wolman v. Walter* allows for the provision of educational services at a neutral site, the creation of KJVSD was not a constitutionally permissible solution to address this "intractable problem." J.A. 40; 433 U.S. at 247-248.[18]

Moreover, provision of educational services at a neutral site would resolve the sect preference problem inherent in Chapter 748; under a *Wolman* approved arrangement, all religious communities would receive the same benefit of having their disabled children educated. However, the New York Legislature, by going far beyond what was necessary to solve the problem of delivering services to the Satmar Hasidic children, crossed the line separating an arguably appropriate response from an unconstitutional joint venture. Consequently, at a minimum, the action of the New York Legislature creating KJVSD was excessive and, in light of the

---

[18] As such, it is unnecessary for this Court to consider whether *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Grand Rapids* are still good law. *See* Brief *Amicus Curiae* of the United States Catholic Conference in Support of Petitioners, at 20-29.

countervailing constitutional considerations, was not narrowly tailored to meet the State's interest.

## II. CHAPTER 748 DOES NOT REPRESENT A PERMISSIBLE ACCOMMODATION OF A RELIGIOUS PRACTICE

Petitioners and supporting *amici* contend that Chapter 748 satisfies the Establishment Clause because the law merely represents a permissible accommodation of "the needs of a community of devoutly religious people." KJVSD Brief at 40.[19] The undersigned *amici* vigorously disagree. As a threshold matter, permissible accommodation is an inappropriate theory for supporting Chapter 748 because the Satmar Hasidic community of Kiryas Joel has not asserted a religious claim in defense of its school district. As the KJVSD Brief asserts in its Statement of the Case:

> The plaintiffs have argued throughout this litigation that the Satmar faith includes "separatist tenets" requiring that its adherents not mix with persons of other faiths. The record does not support this contention, and it is wrong as a matter of fact. While we have never disputed that the Satmar prefer to live together, they do so to facilitate individual religious observance and maintain social, cultural and religious values, not because it is "against their religion" to interact with others.

KJVSD Brief, at 4, n.1; *accord Wieder,* 72 N.Y.2d at 180, n.2. Petitioner's repeated insistence that New York did not create KJVSD in order to meet a religious need removes this case from the

---

[19] While all of the briefs on behalf of Petitioners raise this claim in one form or another, the most comprehensive argument in behalf of accommodation is found in the *amicus* brief of the Christian Legal Society *et al.*, coauthored by Professor Michael W. McConnell, the leading advocate of an expanded view of religious accommodation. *See Accommodation of Religion,* 1985 Sup. Ct. Rev. 1; *Accommodation of Religion: An Update and a Response to Critics,* 60 Geo. Wash. L. Rev. 685 (1992).

ambit of a religious accommodation case. *See Employment Division v. Smith*, 494 U.S. 872, 890 (1990)(affirming government authority to provide "nondiscriminatory religious-practice exemptions."); *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989)(accommodation claims must be rooted in a showing that government activity "offend[s] . . . religious beliefs or inhibit[s] religious activity.").[20] On this ground alone, the claim of accommodation must fail.

Assuming, however, that religion is at the heart of the Satmar Hasidic practice of separatism, R. 452; 464; 495 ¶ 16,[21] and, at a minimum, that the separate school district was created in response to this religious practice and custom, R. 249, 481-482, Chapter 748 represents an impermissible form of religious accommodation. As an initial matter, the Petitioners concede that the type of accommodation asserted here does not rest on a claimed free exercise violation and thus does not fall within the realm of constitutionally compelled or mandatory religious accommodations. KJVSD Brief at 42.[22] As a result, to be constitutional, Chapter 748 must fit within the narrow category of permissible accommodations

---

[20] "[I]n order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

[21] While the separatism of the Satmar Hasidic community may not rise to the level of a recognized tenet, the practice appears to have its basis in Satmar religious traditions. As the Appellate Division below noted: "The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community." 187 A.D.2d at 23. *Accord, Quinones*, 803 F.2d at 1237 ("In general, the Hasidic faith stresses a strict separation between Hasidim and the rest of society.").

[22] The availability of mandatory religious accommodations has been severely curtailed as a result of the Court's decision in *Employment Division v. Smith*, 494 U.S. at 884-885. Because Petitioner KJVSD does not assert a free exercise-based accommodation, it is unnecessary for the Court to consider the effect of the recently enacted Religious Freedom Restoration Act. Pub. L. No. 103-141 (1993).

that are neither mandated by the Free Exercise Clause nor forbidden by the Establishment Clause. *Texas Monthly*, 489 U.S. at 18, n.8; *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987).[23]

Chapter 748 fails to come within this category as defined by the Court. Chapter 748 is quite unlike the accommodation upheld in *Amos*, which involved statutory relief for religious organizations and individuals from the burden of regulation. The accommodation upheld in *Amos* was applicable to all religions, lifted a government-imposed burden, and was arguably required by the Free Exercise Clause. 483 U.S. at 335. Chapter 748 meets none of these criteria. It is sect specific, lifts (at most) a burden imposed by the private conduct of insensitive non-Hasidic school children, and is not required by the Free Exercise Clause. *See* Lupu, *The Lingering Death of Separationism*, 62 Geo. Wash. L. Rev. 230, 271 (1994). Because this case does not involve an attempt to alleviate a government-imposed burden, the formula advanced in the Brief *Amicus Curiae* of the Christian Legal Society, *et al.*, at 9-25, should be rejected. A rule that would allow government to advance religion to the extent that the aid does not impose "substantial burdens on non-beneficiaries" would turn Establishment Clause jurisprudence on its head. *Id.* at 3.

In addition, unlike the accommodation approved in *Amos*, the law provides an *affirmative* benefit in the form of a state-financed and fully operational school district. As such, Chapter 748 is also distinguishable from *Wisconsin v. Yoder*, 406 U.S. 205 (1972)(holding that the Constitution requires an exemption from state compulsory attendance laws), and the *Sherbert*-line of unemployment compensation cases which merely provided that Sabbath observance could not be excluded as grounds for a "good cause" exemption under the law. *Sherbert v. Verner*, 374 U.S. 398, 409 (1962)("the extension of unemployment benefits to Sabbatarians

---

[23] *See* Lupu, *The Trouble with Accommodation*, 60 Geo. Wash. L. Rev. 743, 749-754 (1992)(distinguishing between types of accommodations of religion).

. . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."); *accord Hobbie*, 480 U.S. at 145.[24] In stark contrast to these forms of accommodation, Chapter 748 does not simply allow the Satmar Hasidic community to be "left alone," *see Yoder, supra*, but provides an affirmative government benefit not bestowed upon any other religious group. *Cf. Bollenbach v. Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1469, n.26 (S.D.N.Y. 1987).

Finally, the preferential nature of Chapter 748 also removes this case from the realm of permissible accommodations. It is axiomatic that a permissible accommodation of religion cannot be provided to one group only. In *Amos*, the Court distinguished Section 702 of the Civil Rights Act from the Minnesota statute in *Larson* on the ground that Section 702 afforded "a uniform benefit to all religions." 483 U.S. at 339 (internal quotations omitted). Similarly, the Connecticut statute at issue in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985), failed because it afforded Sabbath observers an absolute and unqualified right to a day off not shared by other believers and nonbelievers.[25] *Accord, Hobbie*, 480 U.S. at 145, n.11 (noting how the statute in *Thornton* "single[d] out a particular class of . . . persons for favorable treatment" and had

---

[24] In *Bowen v. Roy*, 476 U.S. 693, 708 (1986), Chief Justice Burger explained that the issue in *Sherbert* and *Thomas v. Review Board*, 450 U.S. 707 (1981), concerned the "good cause" mechanisms for individualized exemptions. "If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests discriminatory intent." *Accord, Hobbie*, 480 U.S. at 142, n.7.

[25] Under this analysis, Justice O'Connor's concurrence in *Thornton*, with its focus on the discriminatory effect of the law, is more apposite than the Court's opinion in that case. *Id.* at 712 (O'Connor, J., concurring)("The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.").

"the effect of implicitly endorsing a particular religious belief."). Like the statute in *Thornton*, Chapter 748 awards a particular benefit to the Kiryas Joel Satmar Hasidic community that is not shared by any other religious group or community.[26]

Compared to the applicable precedent, the instant law cannot be seen as providing a permissible accommodation of the religious beliefs and customs of the Satmar Hasidic community. Instead, Chapter 748 provides a religious preference, forbidden by the Court in *Larson*. As the Court recently reaffirmed in *Lee*, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 112 S. Ct. at 2655.

## III. THE COURT SHOULD DECLINE INVITATION TO OVERRULE THE TEST ENUNCIATED IN *LEMON V. KURTZMAN*

### A. It is Unnecessary for the Court to Reconsider *Lemon* Because this Case Can Be Resolved Without Direct Reference to the Three-Part Test

Two of the Petitioners and a plethora of supporting *amici* are asking the Court to revisit and discard its analytical framework enunciated in *Lemon v. Kurtzman*, commonly called the "*Lemon* test," 403 U.S. at 602-603, and to subscribe to a new standard that would allow for greater government sponsorship of and involvement in religious affairs. This course has been urged upon the Court before, most recently in *Lee v. Weisman*. The Court declined to reconsider *Lemon* in that case and in *Lamb's Chapel v. Center Moriches School District*, 508 U.S. ---, 113 S. Ct. 2141 (1993), last

---

[26] In a like manner, the release-time provision upheld in *Zorach v. Clauson, supra*, was open to all religious sects desiring to provide religious instruction for school children. Nonetheless, even Professor McConnell has expressed doubts about certain aspects of that decision. *See* 60 Geo. Wash. L. Rev. 685, 705 n.81.

term, and *amici* see no reason for this body to venture down that road in the present case.

The course urged by Petitioners and supporting *amici* is both unnecessary and unwise. As the undersigned *amici* have demonstrated above, *see* Parts I and II, *ante*, the decision of the Court of Appeals can be affirmed without reliance on the three-part test enunciated in *Lemon*. By carving out a separate public school district that is coterminous with and controlled by an insular religious community, Chapter 748 violates core principles of nonestablishment. Chapter 748 is also unconstitutional because it establishes a religious preference, thus violating notions of neutrality and equality.

As a result, reliance here on the *Lemon* test is unnecessary. That this case can be resolved by utilizing other theories is, of course, in accord with the Court's "unwillingness to be confined to any single test or criterion," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), and its oft repeated declaration that the *Lemon* prongs "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *accord, Meek v. Pittenger*, 421 U.S. 349, 359 (1975)("*Lemon* does not set precise limits but serves only as guidelines."). Because it is unnecessary to apply *Lemon* in order to resolve this case, there is no reason for the Court to "reconsider" *Lemon*. The effort to overturn *Lemon* represents an unnecessary distraction for the Court.

In any event, the Court should exercise judicial restraint and decline to reconsider the three-part test. First, for reasons discussed *infra*, the Court should avoid overruling "the sensible core of the *Lemon* test, and the whole line of pre-*Lemon* cases requiring government neutrality toward religion." Laycock, *'Noncoercive' Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. Univ. L. Rev. 37, 53 (1991). Because *Lemon* represents "the cumulative criteria" developed by the Court over the years, *Lemon*, 403 U.S. at 612, its invalidation would effect "a wholesale overturning of settled law concerning the Religion

Clauses of our Constitution." *Employment Division v. Smith*, 494 U.S. at 908 (Blackmun, J., dissenting).[27]

Moreover, notions of *stare decisis* instruct the Court to refrain from reversing settled law, especially when such action is unnecessary. The Chief Justice has expressed the importance of this doctrine in the following terms:

> The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is a natural evolution from the very nature of our institutions.

*Welch v. Texas Dept. of Highways and Pub. Transport.*, 483 U.S. 468, 478-479 (1987)(internal quotation omitted). Under normal circumstances "departure from the doctrine of *stare decisis* demands special justification," factors not present in the instant case. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). But the argument favoring adherence to *stare decisis* and against overturning *Lemon* is even stronger here because, as noted above, the Court has expressly turned back such requests in the previous two terms. If the principle of *stare decisis* means anything, it is that the perennial review of settled case law should be avoided. Because more than thirty years of Establishment Clause jurisprudence are intertwined with the *Lemon* standard, the Court should decline to overrule *Lemon*.

B. The Principles Represented in the *Lemon* Test Have Their Basis in Long-Standing Notions of Neutrality and Equality

Even assuming that a reconsideration of *Lemon* is appropriate, the Court should decline to overrule the three-part test.

---

[27] "[B]efore overruling an entire jurisprudence wholesale, it is advisable to inquire into both the social effects inherent in such a displacement and the jurisprudential need for it." Marshall, *Unprecedential Analysis and Original Intent*, 27 Wm. & Mary L. Rev. 925, 926 (1986).

*Lemon* is much more than a "tidy formula[]" the Court devised to frustrate judges, challenge lawyers and perplex law students. *See Wallace v. Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting). Instead, *Lemon* is "a convenient formulation of the 'cumulative criteria developed by the Court over many years,'" and is but "an elaboration of the fundamental rule that government be neutral with respect to religion." Laycock, *'Noncoercive' Support for Religion*, at 53-54 (quoting *Lemon*, 403 U.S. at 612); *accord, Walz*, 397 U.S. at 669; *Schempp*, 374 U.S. at 222 (the Court's Establishment Clause cases speak of "wholesome neutrality."). Even though the first two parts of the test were enunciated in *Schempp*, its roots are much older and deeper. Notions of neutrality and equality are found in the Court's earliest religion decisions. *See Everson*, 330 U.S. at 18; *Watson*, 13 Wall. at 728. Central to ensuring neutrality and equal treatment of religions are the prohibitions against government financial support, sponsorship, preference, and active involvement in religious activities. *Walz*, 397 U.S. at 668. Whether these commands are represented through terms such as "secular purpose," "primary effect," "excessive entanglement," or some other phrase, "the essential principle remains the same." *Allegheny*, 492 U.S. at 593.[28]

One such formulation of these principles is Justice O'Connor's endorsement test, which "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *Id.* at 627 (O'Connor, J., concurring)(quoting *Wallace*, 472 U.S. at 70). As Justice Blackmun remarked in *Allegheny*, the history of this nation regrettably contains too many examples of official endorsement and promotion of religion, in most instances the promotion of Protestant Christianity to the detriment of Catholics

---

[28] "*Lemon's* 'purpose' requirement aims at preventing the relevant decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335.

and Jews. *Allegheny*, 492 U.S. at 604.[29] Fortunately, the religious favoritism expressed in the maxim "this is a Christian nation" has been conclusively rejected by the Court. *Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting); *see Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892). Such declarations by any arm of government have no place in our religiously diverse society and "no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 605.[30] This history reminds us, however, of the evils of religious favoritism, preference, and support, evils the Establishment Clause "was designed forever to suppress." *Everson* 330 U.S. at 15.

As a result, if this Court chooses to apply the *Lemon* test to the instant case, it should find that Chapter 748 violates the Establishment Clause. As the Court of Appeals held below, Chapter 748 sets up a symbolic union of church and state, thereby creating the perception the State supports and endorses the religious practices of the Satmar Hasidic community. *Grand Rapids*, 473 U.S. at 389. Because Chapter 748 affords a unique, ongoing benefit to the Satmar Hasidic community, instead of simply alleviating a governmental burden, the governmental imprimatur of Satmar Hasidim is overwhelming.

*Amici* in support of Petitioners argue that *Lemon* should be discarded, alleging that the Court's Establishment Clause decisions

---

[29] During the antebellum period, courts periodically employed the Christian nation maxim to justify the imposition of legally sanctioned religious disabilities. *See People v. Ruggles*, 8 Johns. 290 (N.Y. 1811)(blasphemy); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817)(Sabbath breaking); *Updegraph v. Pennsylvania*, 11 Serg. & Rawle 394 (Pa. 1822)(blasphemy); *Atwood v. Welton*, 7 Conn. 66 (1828)(qualification for oathtaking); *Kilgour v. Miles*, 6 Gill & J. 274 (Md. 1834)(Sabbath breaking); *Charleston v. Benjamin*, 2 Strob. 508 (S.C. 1848)(Sabbath breaking).

[30] "This Court . . . squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic." *Id.* at 605, n.55.

evince a level of hostility toward religion.[31] This claim is shortsighted and reveals a fundamental misunderstanding of the Court's holdings in this area. Such claims have been addressed and rejected by the Court on numerous occasions. *See, e.g., Lee*, 112 S. Ct. at 2661 (the Court's decisions express "no hostility" to the concept of prayer); *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring)(neither the endorsement test nor its application . . . reflects "an unjustified hostility toward religion."); *Edwards v. Aguillard*, 482 U.S. 578, 606-608 (1987) (Powell, J., concurring)("the Court has properly noted" the "role of religion in American life."); *Schempp*, 374 U.S. at 225-226 (State may not "affirmatively oppos[e] or show[] hostility to religion."); *McCollum*, 333 U.S. at 211 (refusal to allow public schools to be used for the dissemination of religious doctrines does not "manifest a government hostility to religion or religious teachings."). That the Court's decisions fail to support a claim of hostility is also borne out through the holdings in *Lamb's Chapel, supra; Zobrest, supra; Board of Education v. Mergens*, 496 U.S. 226 (1990); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Amos, supra*; and *Zorach, supra*. Counter to allegations of a religious animus, the principles represented in *Lemon* guarantee the independence and vitality of religion by ensuring that there will never be a "state-created orthodoxy." *Lee*, 112. S. Ct. at 2658. These decisions are to the advantage of religion because, as Justice Brennan wrote in *Schempp*:

> It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply

---

[31] *See* Brief of the Southern Baptist Convention Christian Life Commission as *Amicus Curiae* Supporting Petitioners, at 11-12; Brief of *Amicus Curiae* The Archdiocese of New York in Support of Petitioner, at 6-7.

involved with and dependent upon the government. 374 U.S. at 259 (Brennan, J., concurring).[32]

Petitioner *amici's* objections, in essence, are not to the *Lemon* test but to the whole history of Establishment Clause jurisprudence and its embrace of the notion of neutrality. *See* Brief of Institute for Religion and Polity, at 3-10; Brief for COPLA, at 11-12. *Amici* apparently desire a society in which government shoulders the affirmative obligation to promote religion and align its policies to prevailing religious sentiment. But the Constitution mandates that "the government remain secular, rather than affiliate itself with religious beliefs or institutions. . . . A secular state, it must be remembered, is not the same as an atheistic or antireligious state." *Allegheny*, 492 U.S. at 610.

At the center of *amici's* complaints rests the premise that the controlling, if not sole purpose of the Establishment Clause is to protect and enhance religious liberty. Brief of the Southern Baptist Convention, at 7; Brief of COPLA, at 5.[33] Although ensuring religious liberty surely is an important component of nonestablishment, that impulse does not define or subsume the clause. The Court has long recognized that "the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of

---

[32] James Madison recognized one hundred and seventy-five years ago that "the number, the industry, and the morality of the Priesthood, and the devotion of the people have been manifestly increased by the total separation of the Church from the State." Letter to Robert Walsh, March 2, 1819, in R. Alley, James Madison on Religious Liberty at 81.

[33] A leading proponent of this view is Rev. Richard John Neuhaus, who has recently written that "[t]he first thing to be said about the first liberty is that liberty is the end, the goal, and the entire rationale of what the First Amendment says about religion. . . . The establishment part of the Religion Clause is entirely, and without remainder, in the service of free exercise. Free exercise is the end; proscribing establishment is a necessary means to an end." Neuhaus, *A New Order of Religious Freedom*, 60 Geo. Wash. L. Rev. 620, 626-627 (1992).

government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Nonestablishment also guarantees religious equality,[34] protects the civil state from the encroachments of religion,[35] and ensures the legitimacy and institutional integrity of both religion and government.[36] Concerns for equality, neutrality and integrity are not answered by an Establishment Clause that has as its sole purpose the mere protection of religious exercise.

As an alternative to *Lemon*, Petitioner KJVSD and supporting *amici* urge this Court to adopt a standard that only prohibits government from coercing religious belief or engaging in proselytizing activity. The undersigned *amici* urge the Court to once again reject this alternative. *See Allegheny*, 492 U.S. at 602-609. While noncoercion and nonproselytization represent important

---

[34] "The prohibition on laws respecting establishment is primarily an equal liberty provision; only secondarily is it concerned with religious liberty in a noncomparative sense." Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 Univ. Pa. L. Rev. 555, 568 (1991).

[35] Madison warned against "the danger of encroachments by Ecclesiastical Bodies" on democratic society:

> "What influence in fact have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen as the guardians of the liberties of the people."

"Detached Memoranda," in Alley, *supra*, at 58. Madison also argued that ecclesiastical establishments threatened the "purity and efficacy of Religion" and "Civil Government." *Memorial and Remonstrance*, *id.*, at 90.

[36] According to Professor Lupu, "the identification of a church with state power reduces the dissonance between the claims of religion and those of nationalism. A church with such a link benefits from a reduction of competing loyalties, which might otherwise make the church less appealing to the populace." Lupu, *Reconstructing the Establishment Clause*, at 569.

impulses in Establishment Clause jurisprudence, *see Lee*, 112 S. Ct. at 2655; *Everson*, 330 U.S. at 15-16, the Court has never required proof of government coercion or proselytization as a necessary element for an Establishment Clause violation. To the contrary, the overwhelming number of the Court's prior decisions affirms the exact opposite to be true:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by an enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

*Everson*, 370 U.S. at 430.[37] Limiting the scope of the Establishment Clause to instances where government has actually coerced religious belief or engaged in proselytizing would "gut the core" of the clause and abdicate its role as the preserver of religious neutrality and equality. *Allegheny*, 492 U.S. at 604. According to Professor Laycock, the adoption of a coercion standard would mean that "government need not be neutral between religion and nonreligion, and it need not be neutral among competing religions." Government could then "endorse generic theism, generic Protestantism, Roman Catholicism, Seventh-Day Adventism, or Twelfth Street Pentecostal Holiness Church. Congress could charter The Church of the United States, so long as it did not coerce anyone to join." Laycock, *'Noncoercive' Support for Religion*, at 39; *see also*, Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 Univ. Pa. L. Rev. 555, 579 (1991)(under a coercion standard, "government could

---

[37] The following Court decisions have rejected coercion as a necessary element for an Establishment Clause violation, either expressly or by implication. *Allegheny*, 492 U.S. at 627-628; *Wallace*, 472 U.S. at 61; *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir.), *aff'd mem.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *PEARL v. Nyquist*, 413 U.S. 756, 786 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968); *Schempp*, 374 U.S. at 223; *Engel*, 370 U.S. at 430; *McGowan*, 366 U.S. at 444, n.18; *Zorach*, 343 U.S. at 311-312; *McCollum*, 333 U.S. at 209.

create significant incentives to join a sect, and thereby manipulate religious allegiances in ways highly analogous to the psychic pressure generated by an established church."). As Justice O'Connor observed in *Allegheny*:

> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization [citations omitted] but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.

492 U.S. at 627-628 (O'Connor, J., concurring). The collapse of the Establishment Clause into a coercion/proselytizing prohibition would turn the clause into a mere mirror of the Free Exercise Clause, a violation of which already depends upon a showing of government compulsion. *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 222-223.[38]

Such a construction is inconsistent with the understanding that the Establishment Clause has a meaning and purpose apart from the Free Exercise Clause. *See* discussion *ante*; Lupu, *Reconstructing the Establishment Clause*, at 576-577 ("An interpretation of nonestablishment that renders it redundant cannot capture its meaning, original or otherwise, and should be avoided on general principles of constitutional construction."). Because a coercion/proselytizing standard fails to respond to "the myriad, subtle ways in which Establishment Clause values can be eroded,"

---

[38] According to Professor Carl Esbeck, "[r]educing the establishment clause to the prevention of *coercion* of religiously based conscience renders the clause's reach coextensive with that of the free exercise clause." Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 Notre Dame J. Law, Ethics & Pub. Policy 513, 544 (1990).

*Wallace*, 472 U.S. at 61, it should be rejected as a viable alternate standard for Establishment Clause adjudication.

## CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

Ruth Lansner
Jeffrey P. Sinensky
Steven M. Freeman
Anti-Defamation League
323 United Nations Plaza
New York, NY 10017
(212) 490-2525

Samuel Rabinove
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

*Of Counsel:*
Ira C. Lupu
2000 H Street, NW
Washington, D.C. 20052
(202) 994-6260

Steven K. Green
*(Counsel of Record)*
Americans United for
Separation of
Church and State
8120 Fenton Street
Silver Spring, MD 20910
(301) 589-3707

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

# APPENDIX

## Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this court. Americans United is composed of approximately 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation. Americans United members sincerely believe that the creation of the Kiryas Joel Village School District violates core notions of church-state separation.

## The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, we believe, has been the cornerstone of religious liberty for all in America. Accordingly, we believe that it is not a proper function of government to establish a separate school district to be under the control of any religious faith. This is why we join in the submission of the brief in this case, as we have in numerous earlier cases relating to the principle of separation.

**Anti-Defamation League**

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in such cases as *Lee v. Weisman,* 505 U.S. __ (1992); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids v. Ball,* 473 U.S. 363 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Abington v. Schempp,* 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

**Americans Civil Liberties Union**

The Americans Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights, including the separation of church and state. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. The ACLU and its affiliates have litigated many important church-state cases before this Court under both the Free Exercise Clause, *see, e.g., Church of the Lukumi Babulu Aye v. Hialeah,* 508 U.S. --- , (1993), and the Establishment Clause *see, e.g., Lee v. Weisman,* 505 U.S. __ (1992). This case once again raises important issues about the relationship between church and state in our constitutional system. Accordingly, the proper resolution or this case is a matter of central concern to the ACLU and its members.

**National Council of Jewish Women**

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. We join this brief because of NCJW's belief that religious liberty and the separation of church and state are constitutional principles which must be preserved in a democratic society.

**Unitarian Universalist Association**

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purpose. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.